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September 24, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: July 22, 2004

Case No.: TIA-0147

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late husband (the Worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs, one of which is administered by the DOE.¹

The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not

¹ The Department of Labor administers the other program. See 10 C.F.R. Part 30; www.dol.gov.esa.

reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.²

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request that the DOE's Office of Hearings and Appeals review certain OWA decisions. An applicant may appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

B. Procedural Background

The Worker was employed at DOE's Savannah River site. He worked at the site as a laborer, painter, and laundry worker from 1953 to 1982.

The Applicant filed an application with OWA, requesting physician panel review of three illnesses. They were circulatory problems in the lower legs, breathing problems and shortness of breath, and kidney problems. The Applicant claimed that her late husband's illnesses were a result of his duties as a laborer, painter, and laundry worker, which led to exposure to radiation and other occupational hazards. Record at 7.

The Physician Panel rendered a negative determination on each of the claimed illnesses. For the circulatory problem, the Panel agreed that the Worker had the illness; however, the Panel determined that the Worker's exposures were too low to be a factor in the illness. The Panel stated that the Worker's long documented history of hypertension, mild diabetes, and smoking all were contributing factors to the illness. The Panel also noted the Worker's long family history of coronary problems and blood vessel disease. For the breathing problems and shortness of breath, the Panel noted that at the Worker's last examination in 1982 and at previous annual workplace examinations, the Worker's chest x-ray was normal, his lungs were clear, and a pulmonary functions test showed that there was only mild chronic obstructive pulmonary disorder (COPD). The Panel stated that this "mild limitation" was not due to occupational exposures, but rather was consistent with the Worker's history of smoking. For the claimed kidney problems, the Panel noted that there is no

² See www.eh.doe.gov/advocacy.

documentation of any kidney problem other than a mildly elevated creatinine level, which the Panel stated was linked to the Worker's mild diabetes and hypertension.

The OWA accepted the Physician Panel's negative determination on each claimed illness. The Applicant filed the instant appeal.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure during employment at DOE. The Rule requires that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,³ applied the wrong standard,⁴ or failed to explain the basis of its determination.⁵ On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In her appeal, the Applicant expresses disagreement with the Panel's determinations and states that the Panel's report is inconsistent with the fact that other workers have become ill and died. The Applicant's statements do not provide a basis for granting the appeal. The purpose of physician panel review is to examine whether a particular worker's illness is related to his employment at DOE. The purpose of an appeal is to identify an error in the physician panel process. As mentioned above, the Panel considered each claimed illness, determined that the Worker's exposures were too low to be a factor in the illnesses, and cited the Worker's hypertension, diabetes, and smoking as factors. The Applicant's argument on appeal is merely a disagreement with the Panel's medical judgment. Accordingly, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0101 be, and hereby is, denied.

³Worker Appeal, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).

⁴Worker Appeal, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

⁵*Id.*

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 24, 2004